ATTORNEY FOR APPELLANTS:

JERRY L. ULRICH
Ulrich & Vidra, LLC
New Albany, Indiana

ATTORNEY FOR APPELLEE:

DERRICK H. WILSON
Mattox, Mattox & Wilson
New Albany, Indiana

IN THE
COURT OF APPEALS OF INDIANA

AFTER FIVE, INC. and GLENN LEWIS,	)	
	)	
Appellants-Defendants,	)	
	)	
vs.	)	No. 10A01-0603-CV-94
	)	
GKI/BETHLEHEM LIGHTING,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Jerome Jacobi, Judge
Cause No. 10D01-0402-CC-22

February 7, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

After Five, Inc., d/b/a The Elf Outlet ("After Five"),[1] and Glenn Lewis (collectively "Defendants") appeal from the trial court's judgment in favor of GKI/Bethlehem Lighting in GKI's complaint to recover the balance due on an open account. Defendants present four issues for review, namely:

1. Whether the trial court erred when it determined that it had personal jurisdiction over Lewis.

2. Whether the trial court abused its discretion when it denied Lewis' motion to dismiss under Indiana Trial Rule 9.2.

3. Whether the trial court abused its discretion when it admitted Exhibits 2 and 4.

4. Whether the trial court abused its discretion when it awarded attorney's fees and travel expenses to GKI.

We affirm, in part, and reverse and remand, in part.

FACTS AND PROCEDURAL HISTORY

After Five is an Indiana corporation that operated a retail store under the name The Elf Outlet.[2] On August 7, 2002, Lewis, After Five's chief executive officer and sole shareholder, signed a personal guarantee for After Five's debts. Based on orders placed by After Five, GKI shipped merchandise to After Five on twelve occasions between August 15, 2002, and April 7, 2003. GKI invoiced After Five for each shipment. After Five failed to pay the entire indebtedness when the balance came due.

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[1] The parties' pleadings consistently refer to "Afterfive," but the corporate letterhead of that party, found in an exhibit in Appellee's Appendix, refers to the business as "After Five." Thus, we employ that spelling in our opinion.

[2] After Five and the Elf Outlet are no longer in business and have not been "operational" since more than two years before the April 2005 trial date.

On February 2, 2004, GKI filed a complaint, alleging After Five's breach of contract for failing to pay the invoices and Lewis' personal liability for After Five's indebtedness. GKI served the complaint on After Five in Jeffersonville, Indiana, and the summons was directed to the attention of Lewis. On March 17, 2004, counsel entered an appearance on behalf of After Five and Lewis, and on March 19, 2004, After Five and Lewis "answered separately by way of general denial." Appellant's Brief at 2.

The case was tried to the bench on April 7, 2005. At the start of trial, Lewis submitted an Affidavit, generally denying that the court had personal jurisdiction over him and requesting that the court dismiss the complaint as to Lewis. The trial court accepted the affidavit as an exhibit. At the close of proof, Lewis made four oral motions: (1) to strike GKI's Exhibit 2; (2) to strike the testimony of John Hamlon to the extent it was based on Exhibit 2; (3) to amend Lewis' answer to conform to the proof to allege lack of personal jurisdiction; and (4) to dismiss the complaint as to Lewis for failure to comply with Indiana Trial Rule 9.2. The trial court took the motions under advisement.

On January 17, 2006, the trial court entered judgment against After Five and Lewis. In the judgment, the court denied the oral motions that Lewis had made at the close of trial. Lewis filed a motion to correct error, which the trial court also denied. After Five and Lewis now appeal.

DISCUSSION AND DECISION

Issue One: Personal Jurisdiction

Lewis contends that the trial court's judgment is void because the court lacked personal jurisdiction over him. Personal jurisdiction is the court's power to bring a

person into its adjudicative process and render a valid judgment over a person. Brockman v. Kravic, 779 N.E.2d 1250, 1254 (Ind. Ct. App. 2002). In order to preserve the question of personal jurisdiction, the issue must be timely raised either by a motion pursuant to Indiana Trial Rule 12(B)(2) or in the answer:

> A defense of lack of jurisdiction over the person . . . is waived to the extent constitutionally permissible . . . if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(A) to be made as a matter of course.

Ind. Trial Rule 12(H). A party may amend an answer as a matter of course only if the action has not been placed upon the trial calendar and if the amendment is made within thirty days after the answer is served. Ind. Trial R. 15(A). Failure to so preserve the question will result in its waiver on appeal. State v. Omega Painting, Inc., 463 N.E.2d 287, 290-91 (Ind. Ct. App. 1984).

Here, Lewis did not assert the trial court's lack of personal jurisdiction in his appearance or in his answer. Indeed, his answer merely asserted a "general denial." Appellant's Brief at 2. The trial court granted Lewis' oral motion to amend his answer to conform to the evidence adduced at trial, namely, to assert the defense of lack of personal jurisdiction. But that amendment, although it relates back to the date he originally filed his answer, does not comport with Trial Rule 15(A) for amendment as a matter of course. Lewis also did not file a motion to dismiss under Trial Rule 12(B)(2), and his oral motion to amend his answer at the close of trial is not equivalent to a motion to dismiss under that rule. Thus, Lewis' amendment to his answer did not preserve the issue of personal jurisdiction. We conclude that Lewis waived his right to raise lack of personal jurisdiction. See Ind. Trial R. 12(H).

Issue Two: Trial Rule 9.2

Lewis also contends that the trial court abused its discretion when it denied his oral motion to dismiss the complaint as to Lewis under Indiana Trial Rule 9.2. GKI counters that Lewis waived any issue pertaining to Rule 9.2 because he failed to challenge at the pleading stage his alleged execution of the guarantee.[3] We disagree with GKI that Lewis waived the issue.

Indiana Trial Rule 9.2(B) permits the execution of written instruments, which are the foundation of a pleading but which may be used as evidence in the pleader's case, to be established and challenged at the pleading stage of a lawsuit. Ind. Trial Rule 9.2(B); Master Copy & Reprod. Ctr. v. Copyrite, Inc., 750 N.E.2d 824, 829 (Ind. Ct. App. 2001), trans. denied. Although execution may be presumed if not timely challenged in accordance with Rule 9.2(B), "[t]he ultimate burden of proving the execution of a written instrument is upon the party claiming its validity . . . ." Ind. Trial Rule 9.2(D). "'Presumed' means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence." Id. Thus, a defendant who does not timely contest the execution of a contract pursuant to Rule 9.2(B) may nevertheless refute the presumption of execution by presenting evidence at trial. See id.; Master Copy, 750 N.E.2d at 831.

Here, Lewis did not contest the execution of the personal guarantee in his answer or in an affidavit affixed to his answer in accordance with Rule 9.2(B). Thus, Lewis' execution of the guarantee was deemed "established." See Ind. Trial Rule 9.2(B). But

[3] GKI also argues that Lewis "lost the ability to question the admissibility of the personal guaranty." Appellee's Brief at 15. Lewis does not challenge the admissibility of the guaranty into evidence. Thus, we need not address that issue.

Lewis was still free to challenge the execution of the document at trial. See Master Copy, 750 N.E.2d at 831. In the event that Lewis introduced evidence that would support a finding that he did not execute the guarantee, GKI had the burden of proving execution. Ind. Trial R. 9.2(D).

On appeal, Lewis does not challenge the admission of the personal guarantee into evidence. Rather, he challenges the trial court's finding that GKI met its burden of proving execution of the guarantee at trial. Under Trial Rule 9.2(D) that burden remained with GKI despite the presumption of execution. See Ind. Trial R. 9.2(B), (D). Thus, we conclude that Lewis may challenge the trial court's determination that GKI met its burden of proving the execution of the guarantee.

Lewis contends that the trial court should have dismissed the complaint against him because GKI submitted a "complete lack of proof on the issue[.]" Appellant's Brief at 8. In essence, he argues that the evidence is insufficient to support the trial court's judgment as to the execution of the personal guarantee. Because the trial court made special findings in the judgment, Indiana Trial Rule 52(A) sets forth the appropriate standard of review. Specifically, where the trial court made special findings of fact and conclusions thereon, our review is two-tiered:

> We determine whether the evidence supports the trial court's findings, and we determine whether the findings support the judgment. We will not disturb the trial court's findings or judgment unless they are clearly erroneous. Findings of fact are clearly erroneous when the record lacks any reasonable inference from the evidence to support them, and the trial court's judgment is clearly erroneous if it is unsupported by the findings and the conclusions which rely upon those findings. In determining whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences to be drawn therefrom.

Harlan Bakeries, Inc. v. Muncy, 835 N.E.2d 1018, 1029 (Ind. Ct. App. 2005) (citation omitted). In the face of conflicting evidence, it is not within the province of an appellate court to reweigh the evidence or to reassess the credibility of the witnesses. Wilfong v. Cessna Corp., 838 N.E.2d 403, 406 (Ind. 2005).

Here, at the start of trial, Lewis challenged the execution of the guarantee when he submitted his affidavit. In the affidavit, Lewis denied that he had signed or authorized anyone to sign his name on the guarantee. On that basis, he requested in the affidavit that the complaint against him be dismissed. In the judgment, the trial court found, in relevant part:

> 2. That After Five, Inc. received $158,536.83 worth of inventory from [GKI] on account that was personally guaranteed by Glenn Lewis, individually.
>
> 3. That after numerous credits and one payment of $10.68, the outstanding principal amount owed by After Five, Inc., personally guaranteed by Glenn Lewis, to [GKI] was $112,599.28.
>
> * * *
>
> 12. Defendant's motion to dismiss against Glenn Lewis individually for [GKI's] failure to meet the burden of proving execution of a written instrument as required by Trial Rule 9.2 is denied. Execution is presumed and there was no credible evidence introduced which would support a finding of its non-existence.

Appellant's App. at 4, 6. Lewis argues that finding number 12 in the judgment "not only ignores Lewis' denial and [GKI's] complete lack of proof on the issue but presumes a discretion not permitted by [Rule 9.2]." Appellant's Brief at 8. Based on the record before us, we cannot agree.

The evidence favorable to the judgment shows that After Five ordered from GKI inventory for retail sale. In that regard, GKI received a credit application that was sent via facsimile from After Five's office in Jeffersonville. The credit application was admitted at trial as two exhibits. The first, Plaintiff's Exhibit 1, consists of a two-page pre-printed form from GKI. It is dated August 7, 2002, and lists "After Five, Inc./DBA The Elf Outlet" on the first page as the applicant's business name. Appellant's App. at 11. The rest of the form's first page, requesting contact information and references, is marked "see attached." Id. The second page of Exhibit 1 contains two signatures of Glenn A. Lewis, one under the personal guarantee and one for the overall credit application as "President/CEO" of After Five. Id. Plaintiff's Exhibit 5 consists of six pages, the first of which is on After Five letterhead, setting out the company's contact information, a bank reference, and trade references. The second page is a letter on After Five letterhead dated August 6, 2002, to Fifth Third Bank, authorizing the release of account information to GKI, and that letter contains Lewis' signature. The exhibit also contains a general information sheet about After Five and three reference letters from other vendors who supplied After Five.

Lewis argues that GKI failed to meet its burden of proving execution of the personal guarantee on the credit application. At trial he denied that he had never seen or signed the credit application offered as Plaintiff's Exhibit 1, but he stated that he had seen the documents in Plaintiff's Exhibit 5 and had signed the authorization to the bank on page two of Exhibit 5. Lewis further testified that he was involved in preparing documents necessary to obtain credit from GKI:

Q: Now isn't it true that those six pages [in Exhibit 5] were offered as the attachments to your credit application?

A: Yes.

Q: So you were involved with the attachment to the credit application?

A: I probably, this is the information I instructed to be sent, yes.

Q: So you are aware that the application was being sent?

A: I was aware that, that information there was being sent, yes.

Transcript at 63. Lewis also testified that he had worked with fireworks vendors for twenty years, occasionally having credit lines up to $300,000. In light of his past credit history with other vendors, he stated that he had expected to obtain a $100,000 credit line "plus" from GKI, a vendor with whom he had not previously done business, without giving a personal guarantee. Id. at 75. And, when asked about the number of times he signs his name each week for business, whether it could be "as much as a hundred a week, fifty a week," Lewis responded, "[i]t could vary, yes." Id. at 73.

We have reviewed the record and conclude that the trial court's decision is not clearly against the logic and effect of the facts. Lewis was involved in preparing documents for the credit application, and the application documents in Exhibits 1 and 5 were all sent via facsimile from After Five's office. The trial court disbelieved Lewis' testimony that he did not sign the personal guarantee. By disagreeing with the trial court's conclusion, Lewis asks us to reweigh the evidence and his credibility, which we cannot do. See In re Estate of Banko, 622 N.E.2d 476, 481 (Ind. 1993). Although in some instances the evidence is conflicting or could support differing inferences, it was for the trial court to resolve those conflicts and draw those inferences. See id. Thus, Lewis

has not met his burden of showing that the trial court abused its discretion when it denied his motion to dismiss the complaint as to Lewis under Indiana Trial Rule 9.2.

Issue Three: Admission of Evidence

Defendants argue that the trial court abused its discretion when it admitted certain evidence. Specifically, Defendants assert that the trial court should not have admitted Plaintiff's Exhibits 2 and 4. We address each contention in turn.

Standard of Review

The decision to admit or exclude evidence is within the sound discretion of the trial court and is afforded great deference on appeal. Davidson v. Bailey, 826 N.E.2d 80, 85 (Ind. Ct. App. 2005) (quoting Bacher v. State, 686 N.E.2d 791, 793 (Ind. 1997), aff'd on other grounds after remand, 722 N.E.2d 799 (Ind. 2000)). A decision will be reversed only for a manifest abuse of that discretion. Id. An abuse of discretion occurs if the trial court's decision is against the logic and effect of the facts and circumstances before the court. Sullivan Builders & Design, Inc. v. Home Lumber of New Haven, Inc., 834 N.E.2d 129, 134 (Ind. Ct. App. 2005), trans. denied. We will not reverse the trial court's admission of evidence absent a showing of prejudice. Id.

Plaintiff's Exhibit 2

Defendants contend that the trial court improperly admitted Plaintiff's Exhibit 2. Specifically, Defendants allege that GKI "failed to lay a complete foundation" for the admission of Exhibit 2 under Indiana Evidence Rule 803(6). Our review of the record indicates that Defendants have not preserved that issue for review.

The failure to make a contemporaneous objection to the admission of evidence at trial, so as to provide the trial court an opportunity to make a final ruling on the matter in the context in which the evidence is introduced, results in waiver of the error on appeal. Brown v. State, 783 N.E.2d 1121, 1125 (Ind. 2003). Here, the following colloquy occurred at the start of trial:

> Court: Mr. Ulrich [defense counsel], have you had the opportunity to look at Plaintiff's Exhibit Number 1 and Plaintiff's Exhibit Number 2 which consist of a series of invoices?
>
> Ulrich: Judge, Mr. Wallingford assures me that these are identical to the Exhibits to the complaint and that's fine with me. I have obviously seen those.
>
> Court: Okay. Do you have any objection to their admission subject to cross?
>
> Ulrich: Not subject to cross, Judge.
>
> Court: Okay. Do you [Plaintiff's counsel] have any objections to the Defendants' Exhibit Number 1, which is an affidavit from Defendant Glenn Lewis?
>
> Wallingford: None, your honor.
>
> Court: Alright. Those exhibits are deemed admitted. Plaintiff's 1 and 2 and Defendant's 1.

Transcript at 7. Plaintiff's Exhibit 2 was admitted at the start of trial, and Defendants agreed to its admission subject to cross. Defendants do not cite to, nor can we find, any authority supporting their assertion that the admission of evidence "subject to cross" does not result in the admission of that evidence at that time. Because Plaintiff's Exhibit 2 was admitted at the start of trial, without objection, Defendants have waived for review

any issue regarding the admissibility of that exhibit.[4]

Plaintiff's Exhibit 4

Defendants also maintain that the trial court abused its discretion when it admitted Plaintiff's Exhibit 4 over their objection. Specifically, Defendants contend that GKI failed to lay the proper foundation for the admission of Exhibit 4 under Indiana Evidence Rule 803(6). We conclude that Defendants have waived that argument.

Plaintiff's Exhibit 4 is a single page containing a computer printout of the amount owed to GKI by After Five as of April 16, 2003. The bottom of the page contains Hamlon's handwritten interest calculations that were made during trial. Defendants objected only to the preprinted top half of Exhibit 4. But Defendants concede that Exhibit 4 was "an altered form of [Exhibit 2,]" the alterations being the handwritten interest calculations. Appellant's Brief at 9. As such, the preprinted top half of Exhibit 4 was admitted as part of Exhibit 2 at the start of trial without objection. Because Defendants agreed to the admission of the preprinted part of Exhibit 4 at the start of trial, they waived any objection regarding the admission of that Exhibit for lack of foundation or on any other ground.[5] Thus, Defendant's argument as to the admission of Exhibit 4 is without merit.

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[4] Defendants also argue that the trial court should have granted their motion to strike the testimony of GKI's witness, John Hamlon, to the extent that Hamlon relied on Exhibit 2. Because Defendants have waived for review the admissibility of Exhibit 2, we need not address their argument that testimony based on that exhibit should have been struck.

[5] We note that the Exhibit Volume prepared by the clerk of the trial court does not appear to contain all of the exhibits offered at trial, nor does it show that Exhibit 4 was, before Hamlon added the interest calculations, originally part of Exhibit Two. As noted above, our conclusion regarding the admissibility of Exhibit 4 is based on the statement in Appellant's Brief regarding the source of that exhibit. But we respectfully remind the clerk of the trial court that the Transcript should consist of "the transcript or transcripts of all or part of the proceedings in the trial court . . . that any party has designated

Issue Four: Attorney's Fees and Costs

Attorney's Fees

Defendants contend that the trial court abused its discretion when it awarded attorney's fees to GKI. GKI counters that the credit application provided for an award of attorney's fees. We must agree with Defendants.

Indiana follows the "American rule," under which each party is ordinarily responsible for paying his or her own legal fees in the absence of a fee-shifting statutory or contractual provision. H & G Ortho, Inc. v. Neodontics Int'l, 823 N.E.2d 734, 737 (Ind. Ct. App. 2005). And "[i]t is well settled that one is entitled to attorney fees when provided for by statute or contract." Parrish v. Terre Haute Sav. Bank, 438 N.E.2d 1, 3 (Ind. Ct. App. 1982) (citing Trotcky v. Van Sickle, 227 Ind. 441, 85 N.E.2d 638 (1949)) (emphasis removed). A provision for attorney's fees must be expressly stated in the contract or statute. See Burk v. Heritage Food Serv. Equip., Inc., 737 N.E.2d 803, 819 (Ind. Ct. App. 2000). Where, as here, an award of fees is premised on a contractual provision, the agreement will be enforceable only in accordance with its terms and only if it does not violate public policy. See H & G Ortho, Inc., 823 N.E.2d at 737.

On appeal from an award of attorney's fees, we apply the clearly erroneous standard to factual determinations, review legal conclusions de novo, and determine whether the decision to award fees and the amount of the award constituted an abuse of the trial court's discretion. Id. An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before it. Id.

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for inclusion in the Record on Appeal and any exhibits associated therewith." Ind. Appellate Rule 3(K). In its Notice of Appeal, After Five requested that the Record include all exhibits admitted into evidence.

Attorney's fees are routinely differentiated from costs. Countless legal documents, including notes, mortgages, and leases, provide for the payment of attorney's fees and costs in the event of default. And, as noted above, an award of attorney's fees must be based on an express authorization in a statute or contract. See Burk, 737 N.E.2d at 819. Thus, the term "attorney's fees" is a term of art not to be confused with other expenses or costs.

Here, the credit application, which was signed by Lewis as "President/CEO" of After Five, provides, in relevant part: "The undersigned also agrees to pay accrued delinquent charges and any and all costs incurred by GKI/Bethlehem Lighting in the event the undersigned does not make timely payment to GKI/Bethlehem Lighting." Appellant's App. at 12 (emphasis added). And the personal guarantee section of the credit application similarly provides: "In consideration of any credit extended: I (we or either of us) will individually and/or jointly guarantee full and prompt payment of all indebtedness by . . . After Five, Inc.[,] incurred for merchandise furnished by GKI/Bethlehem Lighting – a division New England Pottery plus service charges and collection costs where applicable." Id. (emphasis added). Neither provision refers in any way to attorney's fees. Thus, the trial court erred when it awarded attorney's fees to GKI. As such, we reverse the judgment to the extent it awarded attorney's fees and remand to the trial court with instructions to modify the judgment to exclude an award for such fees.

Travel Expenses

Defendants also contend that the trial court erred when it awarded witness travel expenses as costs. As noted above, After Five agreed to pay "any and all costs" in the event it did not make timely payment to GKI, and Lewis personally guaranteed payment of After Five's debt including "collection costs[.]" Appellant's App. at 12. Thus, Defendants agreed to pay the costs associated with their failure to timely pay the amount owed to GKI. The question becomes whether travel expenses for GKI's witness constitute costs or collection costs. We conclude that they do not.

Costs were unknown at common law and may be awarded only when they are authorized by statute, Conklin v. Fisher, 803 N.E.2d 693, 694 (Ind. Ct. App. 2004), or by contract, see H & G Ortho, Inc., 823 N.E.2d at 737. Whether travel expenses constitute collection costs has not previously been addressed in the context of a contractual agreement. But reference to a statutory damages provision is instructive. Indiana Code Section 34-24-3-1 sets out the damages available in certain types of civil actions, such as offenses against property, criminal confinement, interference with custody, and offenses against the public health, order, and decency. The statute allows the recovery of travel expenses incurred to "attend court proceedings related to the recovery of a [civil] judgment." Ind. Code § 34-24-3-1(4). Costs are listed separately from travel expenses in the statute and are thereby distinguished from travel expenses. Thus, in the statute, travel expenses are not the same as costs.

In Goeke v. Merchants National Bank and Trust Co., 467 N.E.2d 760 (Ind. Ct. App. 1984), this court addressed the interpretation of a guarantor's liability under a

guarantee. The guarantor argued that the guarantee limited his exposure to the principal amount owed, despite language that he guaranteed "costs of collections and reasonable attorney fees[.]" Id. at 769. On appeal, this court noted

> the proper path to solution involves the construction of this particular contract. A guarantor is a favorite in the law, and he is not bound beyond the strict terms of his engagement. . . . Any ambiguities in a contract are to be construed against the party who employed the language and prepared the contract.

Id. We agreed, noting that the guarantee in Goeke provided for both collection costs and attorney's fees and limited liability to the principal amount owed. Thus, we held that "a serious, if not critical, ambiguity exist[ed] in the document, and according to the rules of construction, it [had to be] resolved in favor of [the guarantor] and against the [creditor]." Id. at 770. As such, the court modified the judgment downward to the principal amount of the debt. Id.

Here, After Five agreed to pay costs, and the guarantee provided for the award of collection costs. But neither term is defined in the credit application or the guarantee; thus, we must construe the guarantee. The interpretation of a contract is "a pure question of law and is reviewed de novo." Trinity Homes, LLC v. Fang, 848 N.E.2d 1065, 1068 (Ind. 2006). As noted above, the American Rule requires each party to pay his or her own costs. Exceptions are made if explicitly provided for by statute, Conklin, 803 N.E.2d at 694, or contract, see H & G Ortho, Inc., 823 N.E.2d at 737.

In light of the American Rule, the separate treatment of travel expenses from other costs in Indiana Code Section 34-24-3-1, and the credit application's and guarantee's failure to define "costs" or "collection costs," we conclude that the guarantee must be

construed against GKI. As such, we hold that neither the credit application nor the guarantee authorizes the award of travel expenses to GKI. We reverse that part of the judgment and remand to the trial court with instructions to modify the judgment to exclude an award for GKI's travel expenses.

Conclusion

We conclude that Lewis waived any challenge to personal jurisdiction because it was not timely raised pursuant to Indiana Trial Rule 15 and because he submitted himself to the court's jurisdiction by requesting affirmative relief. We further conclude that Lewis did not waive his right to challenge execution of the guarantee under Indiana Trial Rule 9.2. However, with regard to the trial court's ultimate conclusion that Lewis executed the guarantee, he failed to demonstrate on appeal that the evidence does not support that finding. Additionally, Defendants waived for review any issue regarding the admissibility of Plaintiff's Exhibits 2 and 4. And finally, we conclude that the trial court abused its discretion when it awarded attorney's fees and travel expenses to GKI. As such, we reverse that part of the judgment and remand with instructions to modify the judgment to delete those awards.

Affirmed in part and reversed and remanded in part.

MAY, J., and MATHIAS, J., concur.